NO. 47814-5-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

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STATE OF WASHINGTON,

Respondent,

vs.

SCOTT WILLIAM JOHNSON,

Appellant.

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# RESPONDENT'S BRIEF

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A. REPLY TO ASSIGNMENTS OF ERROR

1. Trial counsel was not ineffective either by admitting Croseman's statement or by failing to interview the police officer.

2. The State concedes that the trial court erroneously sentenced the defendant with an offender score of ten. However, the error is harmless.

B. STATEMENT OF THE CASE

On March 20, 2015, police officers executed a search warrant on the residence of the defendant, Scott Johnson. RP 60. Officers were looking for the defendant and also looking for illegal narcotics, specifically heroin. RP 61, 84. There were multiple people in the residence when the officers entered, but the defendant was in a bedroom that he later admitted was his own with two women. RP 62, 65. When the officers entered the bedroom, the defendant was leaning over a nightstand and was reaching for or hiding something in a cluttered area on the floor. RP 63, 103. A purse belonging to Jacquelyn Croseman was located in this area and officers found heroin inside the purse. RP 67. Officers also found methamphetamine on the nightstand in the defendant's bedroom. RP 67.

The defendant was charged with possession of methamphetamine and possession of heroin and the case proceeded to trial on June 9, 2015. CP 1, RP 6. At trial, the defense attorney brought out that Croseman

worked at the prosecutor's office, that she was not arrested, and also highlighted the number of people in the house to cast doubt on the allegation that the defendant was hiding heroin in the purse. RP 69–76. He then asked Detective Libbey if Libbey asked Croseman if she had any heroin in her purse. Libbey responded that Croseman said the heroin belonged to Mr. Johnson. RP 76.

Another officer testified that he had also spoken to Croseman and she did not mention anything about the heroin belonging to the defendant. RP 122.

The jury found the defendant guilty of both counts. RP 190. At sentencing, the parties agreed the defendant's offender score was ten, with a point for each of the counts charged in this case. RP 203.

C. ARGUMENT

**1. Trial counsel was not ineffective.**

To establish ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that the deficiency prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052 (1984); *State v. Thomas*, 109 Wn.2d 222, 225, 743 P.2d 816 (1987). There is a strong presumption of effectiveness that a defendant must overcome. *Strickland*, 466 U.S. at 689. To prove that

counsel was deficient, "the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Id.*; *State v. Barragan*, 102 Wn. App. 754, 762, 9 P.3d 942 (2000). Thus, one claiming ineffective assistance must show that in light of the entire record, no legitimate strategic or tactical reasons support the challenged conduct. *State v. McFarland*, 127 Wn.2d 322, 335–36, 899 P.2d 1251 (1995).

The Washington Court of Appeals has devised the following test to determine whether counsel was ineffective: "After considering the entire record, can it be said that the accused was afforded an effective representation and a fair and impartial trial?" *State v. Jury*, 19 Wn. App. 256, 262, 576 P.2d 1302 (1978), *citing State v. Myers*, 86 Wn.2d 419, 424, 545 P.2d 538 (1976). Like the *Strickland* test, this test requires the defendant to prove that he was denied effective representation, given the entire record, and that he suffered prejudice as a result. *Id.* at 263. The first prong of this two-part test requires the defendant to show that his lawyer "failed to exercise the customary skills and diligence that a reasonably competent attorney would exercise under similar circumstances." *State v. Visitacion*, 55 Wn. App. 166, 173, 776 P.2d 986 (1989). The second prong requires the defendant to show "there is a reasonable probability that, but for the counsel's errors, the result of the

proceeding would have been different." *Id.* Therefore, even if a defendant can show that counsel was deficient, he also must show that the deficiency caused prejudice.

> a. *The defendant cannot show that his counsel failed to exercise the customary skills and diligence of a reasonably competent attorney by introducing Croseman's statement; nor can the defendant show prejudice.*

Looking at the entire record in this case, trial counsel gave effective representation. First, there is no indication in the record that the defense attorney either did or did not interview the investigating officer. Second, not interviewing an investigating police officer was not ineffective. There is no requirement that a defense attorney interview witnesses prior to trial. *Matter of Pirtle*, 136 Wn.2d 467, 488, 965 P.2d 593 (1998). The law gives defense attorneys wide latitude and flexibility regarding trial strategy and tactics, which includes whether to interview witnesses before trial. *Id.*, *quoting State v. Piche*, 71 Wn.2d 583, 590, 430 P.2d 522 (1967).

In this case, the defense attorney had access to the police reports and was apparently familiar with their contents. He questioned the officer about how there was nothing in his report about his conversation with Croseman and, in fact, nothing in the report indicated that the officer had spoken to Croseman at all. RP 79–80. He then argued in closing that the

officer had put nothing in his report about his conversation with Croseman, indicating that the jury was unable to even determine when the conversation took place. RP 173–74. Reviewing the police reports gave the defense attorney the information he needed to exercise the customary skills and diligence of a reasonably competent attorney. In fact, interviewing the officer could have been detrimental to the defense's case, as it could have tipped the defense's hand toward the State.

In addition to overcoming the strong presumption of effective assistance, the defendant must also show that he was prejudiced. Prejudice is not established unless it can be shown that "there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different." *McFarland*, 127 Wn.2d at 335. A reasonable probability is one that is "sufficient to undermine confidence in the outcome of the trial." *Strickland*, 466 U.S. at 694. The defendant here cannot show that the outcome of the trial would have been different but for his attorney's bringing in Croseman's statement. The State presented sufficient other evidence to show that the defendant possessed the heroin found in the purse. First, Detective Libbey testified that, when he entered the defendant's room, the defendant was leaning over a nightstand and looked like he was hiding something. RP 63. The defendant did not immediately comply with the officers'

commands. RP 64. Sergeant Hartley testified that the defendant was reaching for something on the floor, in among some clutter along the western wall of the room. RP 103. The heroin was found in a purse that was located in that clutter. RP 104. Finally, the jurors were given a jury instruction that explained the difference between actual and constructive possession. CP 15. With the testimony and the jury instructions, the defendant cannot prove that the outcome of the trial would have been different had Croseman's statement not been admitted. Therefore, ineffective assistance of counsel is not shown here.

**2. The State concedes that the two counts of possession alleged in this case are the same criminal conduct and the defendant should have been sentenced with an offender score of nine. However, the error is harmless.**

The defendant's current charges comprised the same criminal conduct. As such, he should have been sentenced with an offender score of nine. However, remand for resentencing is not required because the standard range for the offenses did not change so the error was harmless, and the sentencing court would have imposed the same sentence regardless of the error. *State v. Tili*, 148 Wn.2d 350, 358, 60 P.3d 1192 (2009).

First, under RCW 9.94A.517(1), the standard range for a class I offense with an offender score of six to nine or more is 12+ to 24 months.

Therefore, whether the defendant's score was nine or ten, his range would be 12+ to 24 months.

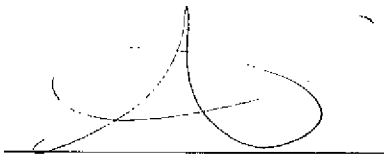
Second, the court would have imposed the same sentence regardless of the error in the defendant's offender score. The State pointed out that the defendant's criminal history included five prior drug-related convictions and that the case against the defendant had begun as a delivery case. RP 201. These two facts would have remained the same regardless of whether the defendant's offender score was nine. The sentencing judge then sentenced the defendant to eighteen months, the midpoint of the defendant's range. RP 203. Given the defendant's history, the facts of the case, and the fact that it went to trial, the judge would have likely sentenced the defendant to eighteen months whether the defendant's offender score was ten or nine. Therefore, the conviction and sentence should be affirmed and the case should be remanded solely for correction of the judgement and sentence to reflect the correct offender score.

## D. CONCLUSION

The defendant's convictions for possession of heroin and methamphetamine should be affirmed, as trial counsel was not ineffective. The defendant's sentence should also be affirmed, as the two offenses

were not "same criminal conduct," and his sentencing range would be the same whether his offender score is ten or nine.

Respectfully submitted this 9th day of March, 2015.



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**CERTIFICATE OF SERVICE**

Michelle Sasser, certifies that opposing counsel was served electronically via the Division II portal:

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I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on March 7, 2016.

/s/ Michelle Sasser

Michelle Sasser

# COWLITZ COUNTY PROSECUTOR

## March 07, 2016 - 12:52 PM

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